No. 83-5596

In The
Supreme Court of the United States
October Term, 1983

JOSEPH ROBERT SPAZIANO,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE ON THE MERITS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The petitioner has consented to the filing of this br..., but the respondent has withheld its consent. The petitioner's letter of consent has been filed with the Clerk.

The amici curiae seek permission to jointly file this brief in support of the petitioner in this cause pursuant to Rule 36.3. The present case is before the Court for oral argument. The interest of amici is set forth in the statement of interest appearing in the brief.

The issue of application of the death penalty where a trial jury has determined that a sentence of life imprisonment is the appropriate sentence is a question of major importance to the fairness of procedures utilized in capital sentencing decisions. This issue has not been squarely considered or addressed in previous decisions. This is the first time that this procedure has been given plenary review by this Court.

Because of the experience of the amici and their deep concern for the fairness of judicial procedures, they have analyzed the due process considerations in an historical context which the parties would be unable to do. This analysis should assist the Court in consideration of the case before it.

Wherefore, it is respectfully requested that leave be granted to file this amicus curiae brief.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The amici curiae have no financial or proprietary interest in the outcome of this case. Rather, they have by their experience throughout their careers developed a deep interest in the fairness of judicial procedures and significant experience and knowledge of the functioning of our system of justice.

Richard W. Ervin is a former Attorney General of the State of Florida and a former Justice and former Chief Justice of the Supreme Court of Florida who is engaged in the practice of law in Tallahassee, Florida.

Thomas A. Horkan, Jr. is an attorney in Tallahassee, Florida, and is Executive Director of the Florida Catholic Conference and Counselor to the Catholic Bishops of Florida.

Ramsey Clark is a former Attorney General of the United States who is engaged in the practice of law in New York City.

The amici have jointly filed this brief to discuss solely the constitutional validity under the Due Process Clause of the procedure at issue here of the imposition by a State of a death sentence after a trial jury has determined that the defendant's life should be spared. The Court has not previously focused upon this issue. Amici are able to provide a concise discussion of this question that is relevant to disposition of the cause. This should aid the Court's consideration of the issue on the merits.

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SUMMARY OF ARGUMENT

This case focuses on the delicate relationship between judge and jury in deciding the life, or death of a defendant. May the State of Florida authorize a trial judge to impose a sentence of death, despite a jury's decision for life made after a full trial of the penalty issues?

We assume that the petitioner will address other relevant constitutional issues and that petitioner will

elaborate the Florida statutory procedure. We will discuss only the application of the Due Process Clause of the Fourteenth Amendment to the challenged procedure. This procedure conflicts with basic values of our Anglo-American legal heritage: the absolute finality of a jury's decision for the accused, the predilection to err on the side of mercy, and the evolving standards of caution and restraint in the use of capital punishment.

Under *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), Florida trial judges may properly impose a death sentence after a jury life determination only if "virtually no reasonable person could differ." Thus constitutionally prohibiting this practice should have little impact on Florida's over-all capital punishment scheme.

* * * * *

In *Witherspoon v. Illinois*, 391 U.S. 510, 522 n. 20 (1968), this Court announced a new doctrine that deciding life or death involves "much more . . . than a simple determination of sentence." Subsequent cases have confirmed and amplified this axiom of modern death penalty jurisprudence. Hence procedures used to decide life or death must be tested against "evolving standards of procedural fairness," see *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

Until now, Florida's procedure of imposing death despite a jury decision for life has never been so tested.

In the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), Florida enacted a death penalty scheme which has been found constitutional as a whole. See *Proffitt v. Florida*, 428 U.S. 242 (1976) (facial constitutionality); *Dobbert v.*

Florida, 432 U.S. 282 (1977) (ex post facto claim); and *Barclay v. Florida*, — U.S. —, 77 L. Ed. 2d 1134 (1983) (claim of arbitrariness). While it is true that *Dobbert* and *Barclay* involved a situation where a jury life recommendation had been set aside, the prior decisions do not focus upon due process concern nor has there been a decision on whether the procedure violates the Due Process Clause.

The prior cases answered two main questions: (1) whether Florida's new system promotes rationality and consistency at the trial and appellate levels; and (2) whether it provides adequate avenues for mercy.

By definition, correcting any unreasonable jury decision must promote rationality and consistency, see *Proffitt*, 428 U.S. at 252, and *Barclay*, — U.S. —, —, 77 L. Ed. 2d at 1157 (Stevens, J., concurring). In terms of Florida's *overall* system, the adverse nature to some defendants of overriding a jury life decision when "virtually no reasonable person could differ" may seem unimportant when contrasted with the many avenues of mercy open after a jury decision for death, see *Dobbert*, 432 U.S. at 295-296. The Court indicated that overruling an unreasonable jury life determination may be constitutional when judged under these specific criteria alone.

But while rationality and consistency are essential to the rule of law, until all relevant values are considered, there can be no definitive due process adjudication.

In *Duncan v. Louisiana*, 391 U.S. 145, 154-155 (1968), the Court rejected "weighty and respectable dicta" asserting that the States need not provide jury trial in serious criminal cases, but evoking seven centuries of profound

experience not explored in such dicta, the *Duncan* Court held that jury trial is indeed fundamental to our scheme of ordered liberty and due process.

In *Jackson v. Denno*, 378 U.S. 368 (1964), *overruling Stein v. New York*, 346 U.S. 156 (1953), the Court held it a violation of due process for a jury trying guilt or innocence to determine (for the first time) the voluntariness of the defendant's alleged confession. *Stein* had approved this procedure as compatible with accurate and reliable factfinding; but the *Jackson* Court, 378 U.S. at 385-386, stressed that *Stein* had failed to recognize the "complex of values" demanding that our trials be kept absolutely free from the taint of coerced confessions.

This Court should now carefully consider the "complex of values" which may be offended when the State ventures to overturn a representative jury's decision for the accused on the ultimate issue of life or death itself.

Guided by the criteria of *Proffitt, Dobbert* and *Barclay*, alone, States might well decide to override unreasonable jury acquittable in trials of guilt or innocence. By definition, this practice would enhance accuracy and consistency. Moreover, this minor exception to the absolute finality of a jury acquittal would affect only a few isolated defendants—as opposed to the many who benefit from trial level and appellate remedies after a jury conviction.

Yet as this Court observed so pertinently in *Gregg v. Georgia*, 428 U.S. 153, 199 n. 50 (1976), such a merciless quest for consistency would violate our deepest values:

> [I]f a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new

> trial ordered, since the discretionary act of jury nullification would not be allowed. . . . Such a system, of course, would be totally alien to our notions of criminal justice.
>
> Moreover, it would be unconstitutional. . . . The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment.

In *Bullington v. Missouri*, 451 U.S. 430, 445 (1981), the Court made clear that the finality values articulated in *Gregg* "are equally applicable when a jury has rejected the State's claim that the defendant deserves to die. . . ."

Hence when subjected to the type of due process analysis made imperative by *Jackson v. Denno* and *Duncan*, the infliction of death in the face of a jury's decision for life is incompatible with our common law heritage and the Constitution.

Needless to say, a Florida trial judge's power to *reduce* a jury determination of *death* violates no constitutional precept.

In sum, the procedure of inflicting death after a jury decision for life is an anomaly; it is out of character with the ameliorative nature of Florida's overall capital punishment scheme, and with the law of the land. It should be declared unconstitutional.[1]

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1. Under Florida's system, overriding a jury life determination can serve only two rational purposes: (1) Correction of *occasional* "errors" for leniency of the sort we have always tolerated in trials of guilt or innocence, see *Tedder, supra;* and (2) Compliance with the Florida Supreme Court's holding that "allow-

(Continued on the following page)

ARGUMENT

I. Imposition Of The Death Sentence Despite A Jury Determination For Life Violates The Due Process Clause Of The Fourteenth Amendment.

May society constitutionally impose the ultimate sanction of death despite a jury determination in favor of life? This question implicates at once ancient Anglo-American traditions and the most recent "evolving standards of procedural fairness," see *Gardner, supra.*

While this issue is uniquely grave, it is at the same time profoundly simple. In resolving the issue this Court should be guided by our common law heritage and its inviolable respect for the jury as the "country" of a capitally accused defendant. Under the Due Process Clause of the Fourteenth Amendment, this is the governing law of the present case; all the rest is commentary.[2]

(Continued from the previous page)

ing the jury's recommendation to be binding would violate *Furman,*" see the case below, *Spaziano v. State,* 433 So.2d 508, 512 (Fla. 1983); *Johnson v. State,* 393 So.2d 1069, 1074 (Fla. 1980); and *Douglas v. State,* 373 So.2d 895, 897 (Fla. 1979). The first purpose is alien to our merciful common law heritage, while the second is retrogressive and aberrant, see *Gregg, supra,* 428 U.S. at 199 n. 50 and 203. Respondent Florida will not be "significantly disadvantaged" by a prohibition of this anomaly; see *Dobbert, supra,* 432 U.S. at 296.

2. The Rabbi Hillel the Elder, as the oracle of another humane and progressively evolving legal system, was once asked to expound the entire Torah while standing on one leg. He replied: "What is hateful to you, do not unto your neighbor; this is the entire Torah, all the rest is commentary." See "Hillel (the Elder)," 8 *Encyclopaedia Judaica* 482, 484 (1972). Amicus would similarly expound the Due Process Clause: "What would be repugnant in a trial of guilt or innocence, must be avoided in the decision of life or death."

As stressed in *Gardner*, supra, 430 U.S. at 357-358, the life or death decision is inherently and constitutionally *sui generis:*

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action.

Since the procedures now required for capital penalty determination are unique both in scope and in gravity, it is impossible to rely on any wooden rule or mechanical formula in deciding "what process is due"—or, as here, *undue*. At the same time, objective standards exists to aid in such a task.

Thus see *Presnell v. Georgia*, 439 U.S. 14, 16 (1978):

> [F]undamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial.

As emphasized in *Duncan, supra*, 391 U.S. at 149 n. 14, judgments of fundamental fairness must be based not on "imaginary and theoretical schemes" of justice, but upon "the common-law system that has been developing contemporaneously in England and in this country."

By logically piecing together these precepts of *Gardner, Presnell*, and *Duncan*, a coherent standard emerges of due process in the penalty phase of a capital trial. Of necessity, procedures used to determine life or death are unique; but they must not deviate arbitrarily from the fundamental norms which govern a trial on the issue of guilt.

More specifically, Florida's death penalty provision for overturning an unreasonable jury decision of life imprisonment must be tested by our legal heritage.

Examination of 700 years of Anglo-American tradition, including nearly 200 years since adoption of our Constitution, reveals that while the accused might at times be denied a jury, once a jury has been included in a criminal proceeding its verdict for the defendant has already been held inviolable.

While much has changed in our jurisprudence over the past seven centuries, this point has remained constant, see Note, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation,* 1968 Duke L. J. 283, 289 n. 26:

> The finality of the verdict is its essential element, and is attested to from earliest common law times by the existence of coercive measures, such as attaint, to persuade the jurors to change the verdict, *as only they could do.* (Emphasis supplied.)

Thus, although attempts where once made to intimidate, attaint, or imprison a recalcitrant or "unreasonable" jury—the finality of a verdict of acquittal has been a permanent feature of our jurisprudence. This protection should not be abandoned now in capital penalty decisions.

That is the question which this Court must now confront, if the insights of *Gardner, Presnell,* and *Duncan* are to retain their vitality and meaning.[3]

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3. See also *Bullington, supra,* which at once follows from and amplifies the logic of these cases.

A. This Procedure Violates Two Fundamental Principles Of Our Anglo-American Heritage: The Absolute Finality Of A Jury's Decision For The Accused; And The Preference To Err In Favor Of Life.

Seeking guidance for the jurors and jurists of a new Nation, Mr. Justice James Wilson of this Court turned in his law lectures of 1790-1791 to an ancient source of lore: Andrew Horne's *Mirror of Justices* (c. 1300), which relates the legendary judgments of the Anglo-Saxon King Alfred (reigned 871-c. 899) against judges themselves unjust; see 2 J. Wilson, *Works* 515 (1967):

> "He hanged Frebern, because he judged Harpin to death, when the jurors were in doubt as to their verdict; for when there is a doubt, they should save rather than condemn."

These texts are short: but they are pregnant with precious instruction. Each juror may here find a salutary lesson for his conduct, in the most important of all the transactions of a man or a citizen—in voting whether a fellow man and a fellow citizen shall live or die.

Modern scholarship may cast doubt on attempts to find jury trial as we know it in Anglo-Saxon times or even in the Magna Carta (1215)[4]; but by around 1300, as the *Mirror of Justices* attests, the emerging system of common law had begun to enshrine two cardinal values: the inviolability of a jury's judgment in favor of the

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4. For the modern view that jury trial cannot be traced directly to Magna Carta, see *Duncan, supra,* 391 U.S. at 151 and n. 16; on the early history of the jury, see *id.*, and also, e.g., *Williams v. Florida,* 399 U.S. 78, 86-91 (1970); and *Apodaca v. Oregon,* 406 U.S. 404, 407-408 (1972).

accused, and the more general predilection of the law to spare rather than to take human life. These two principles developed through the centuries and lead finally to our system of representative democracy and justice.

Because these principles have served as a foundation for our institutions, they are fundamental under the Due Process Clause, see *Presnell, supra.*

Writing in the late 15th century, Sir. John Fortescue took special pride as an English jurist in these intimately intertwining values of jury inviolability and willingness to permit error on the side of mercy, see J. Fortescue, *De Laudibus Legum Anglie* 65 (Tr. 1949):

> Who, then, in England can die unjustly for a crime, when he can have so many aids in favour of his life, and none save his neighbors, good and faithful men, against whom he has no matter of exception, can condemn him? I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly. (Chapter 27.)

English monarchs and magistrates did not always take such a lyrical view of the jury's inviolable prerogative to spare the life of the accused; while the defendant could not be executed in such cases, the jury might be subject to various sanctions for its unreasonableness.

In 1554, Sir Nicholas Throckmorton was charged with high treason for his alleged role in a conspiracy against Queen Mary I. Reaching a result quite extraordinary under the cruel law of treason then applicable, the jury weighed the evidence and found Throckmorton not guilty. Upon declaration of the verdict, the Attorney General requested the Court to detain "these men of the Jury, which have strangely acquitted the prisoner of his

treasons. . . ." In reply, Juror Whetston pled the cause of the jury: "I pray you, my lords, be good unto us, and let us not be molested for discharging our consciences truly. . . ." The jurors were then sent to prison, see *Throckmorton's Case*, 1 Howell St. Tr. 869, 899-900 (1554). Eventually the jurors were fined and released, see *id.* at 901-902.

Despite the religious and social turmoil of the 16th century, English writers continued to extol the humane values of the common law finality of a jury's acquittal and the unreviewability of the power to grant mercy. Hence in 1559, a certain Bishop Aylmer defended the new Queen Elizabeth I's right as a woman to reign in these terms, see G.R. Elton, *The Tudor Constitution: Documents and Commentary* 16 (1960):

> What may she do alone wherein is peril? She may grant pardon to an offender, that is her prerogative wherein if she err it is a tolerable and pitiful error to save life. J. Aylmer, *An Harborowe for Faithful and True Subjects against the Late Blown Blast concerning the Government of Women* (1559).[5]

Another Elizabethan scholar, Sir Thomas Smith, condemned the continuing practice of punishing jurers for their verdicts which seemed unreasonable to the court; he described "such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England." See W. Blackstone, 4 *Commentaries* 361 (1769), *quoting*, T. Smith, 3 *Commonwealth of England* c. 1 (c. 1565).

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5. Compare *Gregg*, *supra*, 428 U.S. at 199 n. 50 (jury's verdict of acquittal and President's power of executive clemency cited as unreviewable acts of discretion in favor of mercy).

Perhaps the most authoritative student of the jury's battle for independence, James Bradley Thayer, also reports Smith's observation that the bark of the judges was often worse than their bite, see J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 163 (1st ed. 1898).[6]

With the succession of James I in 1603 and the rise of Stuart absolutist claims, the Star Chamber became especially important in disciplining juries too favorable to the accused. See Thayer, *id.* at 164, citing a source from the year 1607:

> "when a jury hath acquitted a felon or traitor against manifest proof there they may be charged, in the Star Chamber, for their partiality in finding a manifest offender not guilty. . . ." *Citing Floyd v. Barker*, 12 Co. 23.[7]

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6. "If, having pregnant evidence, nevertheless, the twelve do acquit the malefactor, which they will do sometime . . . the prisoner escapeth, but the twelve not only rebuked by the judges, but also threatened of punishment. . . . But this threatening chanceth oftener than the execution thereof." *Quoting* Smith, *id.*

7. During this early 17th-century period, the great champion of the common law Sir Edward Coke similarly explained why capital defendants were normally refused counsel: "the evidence to convict a person should be so manifest, as it could not be contradicted." See 4 Blackstone, *Comm.* 348-350, *quoting* E. Coke, 3 *Institutes* 137, and *Gideon v. Wainwright*, 372 U.S. 355 (1963), O.T. 1962, No. 155, *Brief for Petitioner* at 21 and n. 20. The concept of *Tedder, supra*—that some offenders may be so worthy of death that "virtually no reasonable person could differ" *even though a jury has differed*—seem strikingly and dangerously akin to this 17th-century attitude. It is noteworthy that Blackstone, *id.*, says that such doctrines seem "not to be all of a piece with the rest of the humane treatment of prisoners by the English law." One could say the same about overriding a jury life decision, as opposed to the overall "ameliorative" nature of Florida's death penalty scheme.

Under the reigns of James I and Charles I, the battle between the common law and the royal prerogative courts such as Star Chamber became part of a confrontation between absolutist and Parliamentary parties which led to the Civil Wars of 1642-1649, the Protectorate of Oliver Cromwell, and the restoration in 1660 of Charles II as a constitutional monarch ruling under a victorious common law. It is here worth observing that the absolutist party in the time of Charles I (reigned 1625-1649) chose as their motto "Thorough"—i.e. in modern terms, a more efficient and "consistent" administration of justice than juries and Parliaments would permit; see, e.g., G. M. Trevelyan, 2 *History of England* 173 (1953). Such clashing values are not wholly alien to the present case before this Court.

While judge-jury conflict sometimes touched directly upon matters of politics and treason, in other instances the jury appeared too lenient to the judges in a capital homicide case (the precise situation here). See Thayer, *id.* at 166:

> In 1666 Kelyng, now Chief-Justice, fined a jury five pounds apiece for a verdict of manslaughter where he had directed them that it was murder. . . . In 1667, Kelyng fined eleven of the grand jury twenty pounds apiece for refusing to indict for murder, and the judges of the King's Bench held this good. The reporter makes the judges add, "And when the petty jury, contrary to direction of the court, will find a murder manslaughter . . . yet the court will fine them."

There, as here, the jury had convicted a defendant of criminal homicide, but then refused to make additional findings of fact required for imposition of the death sentence; see also *Bullington, supra.*

The decisive battle for jury independence was won in 1670, when a London jury refused to convict William Penn and his friend William Mead, despite their manifest participation in illegal Quaker activities upon the specific charge of preaching before an unlawful assembly. Powerless to override the jury's refusal to convict, the court imprisoned the jury. Then Penn spoke in defense of his peers, see *Penn & Mead's Case*, 6 Howell St. Tr. 951, 963 (1670):

> I do desire that justice may be done me, and that the arbitrary resolves of the bench may not be made the measure of my jury's verdict.[8]

Despite prolonged confinement, the jury courageously adhered to its verdict. Thus Penn and Mead were acquitted of the main charge, although Penn and the jurors alike were imprisoned for contempt of court.

In the monumental decision of *Bushell's Case*, 6 Howell St. Tr. 999 (1670), foreperson Bushell and his fellow jurors gained release under a writ of *habeas corpus*. Beyond freeing these particular jurors, the decision estab-

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8. Note that the word "arbitrary" here carries its vigorous sense of "despotic, tyrannical"; see 1 *OED* 426, *arbitrary* (4). As William Penn well understood, refusal to respect a jury's decision for the accused is thus *arbitrary* even if motivated by a desire for "rationality" and "consistency." The type of unguided and unfocused procedure for deciding life or death condemned in *Furman*, on the other hand, would fit the definition of *Arbitrary* (3), *id.*: ". . . capricious, uncertain, varying." In order to avoid the "arbitrariness" prohibited in *Furman*, juries must "be carefully and adequately guided" in deliberating life or death, see *Gregg, supra*, 428 U.S. at 193; in order to avoid the arbitrariness condemned by William Penn, these same juries must be granted the last word when they speak to spare life.

lished the right of all jurors to follow their consciences in doing justice without fear of punishment.

Chief Justice Vaughan of the Court of Common Pleas explained why a jury's sworn finding of facts for the accused must be inviolate, see *id.* at 1012:

> A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or infer the thing to be resolved by anothers understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are forsworn, at least *in foro conscientie.*

Similarly, in *Witherspoon v. Illinois, supra,* 391 U.S. at 519-520, this Court said that the jury "can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."

With *Bushell's Case,* the English common law had established a firm framework for mutual respect between judges and juries in criminal cases. A century later, in 1769, Sir William Blackstone could take the perspective of a historian; in this role, he reports that the practice of "punishing jurors . . . for finding their verdict contrary to the discretion of the judge, was arbitrary, unconstitutional and illegal. . . ." See 4 W. Blackstone, *Commentaries* 361. As Blackstone adds, *id.*:

> But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first.

The inviolate finality of a jury's findings for the accused, a fundamental principle of English law for five centuries by the time of Blackstone, became a keystone of representative justice in America.

• • • •

As shown in F. H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 14-22 (1951), the first permanent colonists of Virginia and Massachusetts brought the jury trial with them as a cherished English right; the institution flourished in its new setting. See also *Duncan, supra,* 391 U.S. at 152.

Like William Penn's acquittal by a London jury in 1670, John Peter Zenger's acquittal by a New York jury in 1735 advanced the values of an independent jury. Charged with seditious libel, Zenger was defended by Andrew Hamilton. See J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal* (1963).

As editor Stanley Nider Katz, *id.* at 22-23, sums up:

> Hamilton chose to address himself to the jurors. . . . Specifically, he maintained that truth was a defense against an accusation of libel, and that the jury had the right to return a general verdict where law and fact were intertwined.

Invoking *Bushell's Case,* he urged the jurors to trust their own sense of justice and reason, see *id.* at 93:

> [J]urymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects.

Assuring the jury of their right to find Zenger's publication nonlibelous, Hamilton cited the undisputed power of a jury in a capital homicide trial to spare the defend-

ant's life by finding manslaughter rather than murder[9]; see *id.* at 91:

> As for instance; upon indictment for murder, the jury may, and almost constantly do, take upon them to judge whether the evidence will amount to manslaughter or murder, and find accordingly; and I must say I cannot see why in our case the jury have not at least as good a right to say whether our newspapers are a libel or no libel as another jury has to say whether killing of a man is murder or manslaughter.

Four decades later, jury trial was a fundamental value to the Framers of the Declaration of Independence and the Constitution. See, e.g., *Duncan, supra,* 391 U.S. at 152-153.

Mr. Justice Wilson regarded the finality of a jury's decision in favor of life to be basic to the system of ordered liberty then being established as he lectured in 1790-1791. Pointing out that "a jury, in criminal cases, may, indeed, be called the country of the person accused," see 2 *Works* at 529, Wilson cited the precept of an Empress of Russia, see *id.*:

> "In a well tempered government, no person is deprived of his life, unless his country rise up against him."
>
> Let others know, and teach, and publish, and recommend fine political principles; it is ours to reduce them to practice.

It is repugnant to this fundamental principle to execute a Florida defendant after his "country" have deliberated and voted for life.

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9. Hamilton's logic is much akin to that followed in *Bullington* (issues in penalty phase of capital case analogous to these in guilt phase); in this case, such logic demands finality for the jury's life determination.

In extolling the inviolability of the "country's" decision to spare a defendant's life, Mr. Justice Wilson did not overlook the faults of juries; rather he understood that in the common law and to the Framers of the Constitution a deliberate choice had been made, see *id.* at 541:

> Juries undoubtedly may make mistakes: they may commit errours: they may commit gross ones. But changed as they constantly are, their errours and mistakes can never grow into a dangerous system. . . . Besides, their mistakes and their errours, except the venial ones on the side of mercy made by traverse juries, are not without redress.

Thus in *United States v. Perez*, 9 Wheat. 579 (1824), which established the double jeopardy rule that a defendant may be retried after a hung jury, Mr. Justice Story added words of caution, see *id.* at 580:

> [I]n capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner.

From this standpoint, there is nothing more alien to a sense of justice than for a judge to interfere with a jury's sworn determination of life by imposing death. Such a practice is inhumanly burdensome to any reasonably compassionate judge, as well as to the jury, the community and the defendant. A statute demanding such a cruel and unusual duty of a judge is contrary to the fundamental law of the land.

Further recognition that capital juries have acted in a lenient manner is found early in our national history in *United States v. Harding*, 26 Fed. Cas. 131, 135 (Case No. 15, 301) (C.C. E. Dist. Penn. 1846). There Circuit Justice Grier noted that co-defendants in a capital mur-

der case typically met fates determined by the equity of the jury rather than the letter of the law:

> In such cases the law esteems every one who aids and abets in the perpetration of the crime as a principal offender, and awards the same punishment to all, without measuring the degree of their participation; yet juries are always unwilling to sacrifice a hecatomb to appease offended justice. They usually select one or two of the most active ringleaders as victims to suffer the extreme penalty of the law, and, usurping the prerogative of the executive, they pardon, rather than acquit, the remainder.

In *Gregg, supra,* 482 U.S. at 182, this Court found much the same patterns:

> [T]he reluctance of juries in many cases to impose the [death] sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.

For a state to overcome this natural reluctance by overturning a jury's decision to spare life violates principles which are deeply ingrained as part of our fundamental values.

Thus, the finality of a jury's decision to spare life is consistent with the overall predilection to err, if at all, on the side of mercy. Two decisions make clear why overturning a jury determination of life is radically different from overturning a determination of death.[10]

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10. Amicus stresses this point in light of *Spaziano v. Florida,* O.T. 1983, No. 83-5596, *Brief for Respondent in Opposition* at 8: "It is submitted that judges can, and do, overturn advisory sentences favoring death regularly. While Mr. Spaziano may not agree with the override procedure, many of his fellow murderers undoubtedly welcome it."

In *Re Winship*, 397 U.S. 358, 372 (1970), which extended the reasonable doubt standard to juvenile delinquency proceedings as part of due process, Mr. Justice Harlan (concurring) mirrored the language of Sir John Fortescue almost 500 years earlier:

> I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

In *Jackson v. Virginia*, 443 U.S. 307, 317 n. 10 (1979), this Court stated a corollary to the "fundamental value determination" noted above:

> To be sure, the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of "not guilty." . . . The power of the factfinder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty.

In light of *Gardner*, *Presnell*, and *Bullington*, *supra*, these Fourteenth Amendment values should apply equally when a jury has chosen life imprisonment as the proper sentence between life and death.

A jury's determination of life imprisonment is at worst a tolerable error "upon the side of mercy" which should remain "unassailable," see *Jackson v. Virginia*, *supra*. However, an unreasonable jury determination of death is subject to judicial review, see *id.*; and a State may decide that trial judges, who actually observe the defendant, should have this authority.

Although the States retain broad discretion "to allocate functions between judge and jury as they see fit,"

this discretion is subject to the transcendent constraints of the Fourteenth Amendment, see *Jackson v. Denno, supra,* 378 U.S. at 391 n. 19.

CONCLUSION

The judicial function of imposing death after a penalty jury has decided to spare a defendant's life is repugnant to our fundamental principles of procedural fairness—and is prohibited by the Due Process Clause.

Therefore, Amicus submits that Petitioner's death sentence should be vacated.

Respectfully submitted,

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